Atlantic Limousine, Inc. *and* Teamsters Local Union No. 331, affiliated with International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 4–RC–18132

August 14, 2000

SUPPLEMENTAL DECISION AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

The issue presented in this case is whether the Employer engaged in objectionable conduct by conducting a raffle on the day of the election.[1] Applying the multifactor test set forth in *Sony Corp. of America,* 313 NLRB 420 (1993), the Regional Director found that the raffle in this case did not interfere with employee free choice in the election.[2] For the reasons set forth below, we have decided to overrule the precedent relied on by the Regional Director and to adopt a new rule prohibiting election day raffles.

I. FACTUAL BACKGROUND

The underlying facts are not in dispute. On October 5, 1998, an election was conducted at the Quality Inn Hotel in Atlantic City, New Jersey, to determine whether the Employer's unit employees wanted to be represented by the Petitioner for the purposes of collective bargaining. Approximately 5 days prior to the election, the Employer distributed a flyer to all employees eligible to vote in the election entitled "ELECTION DAY RAFFLE! ELECTION DAY RAFFLE!" The flyer announced that the Employer would hold a raffle following the election, and that the winner of the drawing would receive a color television with an integrated video cassette recorder. According to the Employer's flyer, the TV/VCR was "approximately equal in value to what your union dues and initiation fees could be for the first year."[3] The flyer also stated that the "sole purpose of the raffle is to encourage everyone to vote," and that participation in the raffle was voluntary.

On the day of the election, the balloting area was established in a room in the rear of the hotel. The raffle was set up at a table in the hotel's middle lobby, and the voting area could not be seen from the raffle area. Voters entering the hotel through its front entrance inevitably passed through the raffle area in the middle lobby to get to the voting area, but voters entering through the hotel's restaurant could avoid the raffle area altogether. The Regional Director's decision does not indicate the relative proportion of voters passing through, or avoiding, the raffle in the middle lobby.

The raffle attendant, a friend of a nonunit employee, was paid $100 by the Employer for the single day to conduct the raffle. The raffle attendant did not know, and made no attempt to learn, the voters by name or face, nor did he make any sort of voter list. He was instructed by the Employer's president to distribute a raffle ticket to each person who approached the table and indicated a willingness to participate. The TV/VCR was displayed on the raffle table, which also held the box in which voters dropped their raffle tickets. The Employer's flyer announcing the raffle was affixed to the raffle box. Ballots counted after the polls closed indicated that the majority of the voters voted against representation by the Petitioner.

II. THE REGIONAL DIRECTOR'S DECISION AND THE REQUEST FOR REVIEW

The Petitioner objected to the Employer's election day raffle, arguing that it constituted a conferral of benefits and created an inappropriate "circus atmosphere" that warranted setting aside the election. The Regional Director conducted an investigation, overruled the objection, and certified the results of the election. Specifically, the Regional Director found that the raffle passed muster under *Sony*, supra, because the raffle was not used as a means to determine how or whether employees voted, participation in the raffle was not conditioned on how the employee voted in the election or on the election's outcome, and the $350 prize was not so substantial that it diverted employees' attention away from the election or its purpose or inherently induced voters to support the Employer's position. The Regional Director observed that the Board's decision in *Arizona Public Service* (*APS)*, 325 NLRB 723 (1998), cast some doubt on the viability of *Sony*.[4] Because, however, there was no majority in *APS* to overrule

[1] Pursuant to a Decision, Order, and Direction of Second Election, an election was held October 5, 1998, in a unit consisting of "[a]ll full-time and regular part-time limousine drivers of the Employer, excluding all other employees, dispatchers, detailers, body person, mechanic, office clerical employees, guards and supervisors as defined in the Act." The tally of ballots shows that there were approximately 145 eligible voters, that 29 votes were cast in favor of the Petitioner and 85 votes were cast against the Petitioner, with no challenged ballots.

[2] The *Sony* test is as follows:

> [T]he Board has held that the conduct of a raffle does not constitute a *per se* basis for setting aside the election. Rather, the Board will consider all of the attendant circumstances in determining whether the raffle destroyed the laboratory conditions necessary for assuring full freedom of choice in selecting a bargaining representative. Some of the factors considered relevant by the Board have been whether circumstances surrounding the raffle provided the employer with means of determining how and whether employees voted, whether participation was conditioned upon how the employee voted in the election or upon the result of the election, and whether the prizes were so substantial as to either divert the attention of the employees away from the election and its purpose or as to inherently induce those eligible to vote in the election to support the employer's position.

[3] The Regional Director found that the cost of the TV/VCR was about $350.

[4] The *APS* decision is fully discussed in sec. III,A, infra. In brief, *APS* involved an election day raffle similar to the one in issue here. Issuing three separate opinions, including a dissent, the three-member panel held that the raffle was not objectionable, but the two members comprising the majority articulated different rationales.

Sony, the Regional Director held that the *Sony* test was the applicable precedent governing this case.

The Petitioner's request for review argues, among other things, that the Board's cases involving election-timed raffles are unwieldy and inconsistent. The Petitioner urges that, particularly in light of the Board's opinion in *APS*, the Board should reconsider the law with regard to election day raffles. The Employer opposes review, arguing that the *Sony* test is clear, and that this raffle is not objectionable on the basis of any of the *Sony* factors. On January 8, 1999, the Board granted the Petitioner's request for review. Thereafter, the Employer filed a brief on review.[5]

III. ANALYSIS

A. Overview of the Board's Raffle Cases

In order that employees may exercise freedom of choice on questions concerning union representation, the Board seeks to create and preserve for its elections an atmosphere free of undue advantage or improper influence. *General Shoe Corp.*, 77 NLRB 124 (1948). In applying this principle to a variety of factual settings, the Board has imposed restrictions on the parties' pre-election conduct. Such restrictions have included, for instance, a "strict rule" against "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots;"[6] a prohibition of "election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election;"[7] a rule barring "changes in the payroll process, for the purpose of influencing the employees' vote in the election, during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls";[8] and a prohibition on the "bestowal of economic benefits" that have "a tendency to influence the outcome of the election."[9] The Board has imposed these restrictions pursuant to the wide degree of discretion it enjoys "in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."[10]

Consistent with this practice, the Board has periodically reviewed the question of whether election-related raffles impair employee free choice in representation elections. The Board's first decisions involving raffles examined their effect on representation elections in only a cursory fashion, and ultimately concluded that the raffles had not impaired employee free choice. For instance, in *Elgin Butler Brick Co.*, 147 NLRB 1624 (1964), the Board summarily reversed the Regional Director's finding that the raffle of a television set only to employees who voted "unduly rewarded employees," holding that the raffle merely encouraged employees to vote and "without more" was not objectionable conduct.

In the late 1960s, the Board considered two cases in which employers added antiunion propaganda to their election-related raffles. In *Hollywood Plastics, Inc.*, 177 NLRB 678, 681 (1969), immediately prior to balloting, the employer distributed raffle tickets to voters offering chances at $82 worth of groceries, which had been displayed in the plant on the day prior to the election with propaganda suggesting that the groceries were equivalent in value to an employee's union dues. The employer announced that the purpose of the raffle was to encourage everyone to vote. Similarly, in *Buzza-Cardozo*, 177 NLRB 589 (1969), the employer distributed raffle tickets to voters offering chances at $84 worth of groceries, which were described to employees as equaling the cost of annual union dues. The employer announced the raffle in a posted advertisement which urged employees to vote. In both cases, which the Board issued on the same day, a divided panel held that the raffles were not objectionable.[11] Recognizing the potential of raffles to influence voters, the Board for the first time concluded that "the use of a raffle as a propaganda gimmick is not a *per se* basis for setting aside the election, *but would rather depend upon the circumstances involved*." *Hollywood Plastics*, 177 NLRB at 681 (emphasis added).

Thus began the Board's use of the multifactor test to determine whether raffles interfered with representation elections. In *Hollywood Plastics*, the Board adopted the Regional Director's inquiry into whether the raffle was used to propagandize about union dues, whether the distribution of raffle tickets occurred in conjunction with any election-

[5] The Employer has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[6] *Michem, Inc.*, 170 NLRB 362 (1968).

[7] *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953).

[8] *Kalin Construction Co.,* 321 NLRB 649 (1996).

[9] *Gulf States Canners,* 242 NLRB 1326 (1979), enfd. 634 F.2d 215 (5th Cir. 1981); *B & D Plastics,* 302 NLRB 245 (1991).

[10] *NLRB v. A. J. Tower Co.,* 329 U.S. 324, 330–331 (1946).

[11] Presaging later conceptual disagreements among Board members as to the nature of the harm caused by raffles, Member Zagoria dissented in both *Hollywood* and *Buzza-Cardozo.* The dissent relied not on the theory that raffles constituted an improper promise of benefits, but rather on their potential to distract the voters away from the task at hand:

> The raffle itself I do regard, by itself, as a sufficient basis for setting aside the election. A Board-sponsored election is a serious governmental function, conducted by agents whose responsibilities are sufficiently numerous without the additional burden of policing games-of-chance. The introduction of the raffle into the election creates a carnival-like atmosphere, transforming the employee from voter into contestant, and diverting his attention from the issue being decided to the possibility of winning a prize. The decision on whether to have a union or not is the significant one and should not be intruded upon by eye-catching propaganda masquerading as a game of chance.

Buzza-Cardozo, 177 NLRB at 589.

Two years later, Chairman Miller adopted Member Zagoria's per se disapproval of raffles, endorsing the view that they create a "carnival-like atmosphere which diverts employees from the real issue of the election." *Electro-Voice, Inc.*, 191 NLRB 425, 426 fn. 2 (1971). That case, like *Hollywood Plastics* and *Buzza-Cardozo*, involved a raffle held on the day of the election for the announced purpose of encouraging voting. As in *Hollywood Plastics* and *Buzza-Cardozo*, the prize was groceries valued at the equivalent of a year's union dues. The panel majority held that the holding of the raffle did not warrant setting aside the election.

eering at or near the polls, whether either the distribution of the tickets or the prize was contingent on how the employee voted or the election results, and whether the value of the prize was so substantial as to induce a vote in favor of the employer. Id. at 681. This multifactor analysis is clearly the early antecedent to the test set out in *Sony*. See footnote 2, supra. As later cases show, however, such a multifactor analysis has proved to be cumbersome and unpredictable.

Illustrative of this point is the Board's inquiry into whether the use of the raffle permits the employer to determine whether employees had voted. In *Hollywood Plastics,* for instance, the Regional Director noted that in distributing the raffle tickets, the employer "went around the shop and made sure that everyone had a ticket" and so was able to "surmise[] that everyone had voted." *Hollywood Plastics*, 177 NLRB at 681. This fact troubled neither the Regional Director nor the Board, which, as indicated above, held that the raffle did not interfere with the election. Similarly, in *American Induction Heating Corp.*, 221 NLRB 180 (1975), the Board found that a raffle was not objectionable despite the fact that a supervisor was stationed near the polling area and distributed raffle tickets to employees after they voted.

By contrast, however, in *Marathon LeTourneau Co.*, 208 NLRB 213, 224, (1974), enfd. 498 F.2d 1400 (5th Cir. 1974), the Board found the employer's election day raffle objectionable on the ground that, during the process of distributing raffle tickets to employees who had voted, the employer checked their names off on a copy of the *Excelsior* list of eligible voters. Thus, the employer was able to ascertain who had voted.

Nor has the Board been consistent when it has focused on the value of the prize to determine whether a raffle is objectionable. In *Drilco*, 242 NLRB 20, 21 (1979), the raffle winner had a choice of an all-expense-paid trip for two to Hawaii or a trip for the family to Disneyworld or Disneyland. In *Grove Valve & Regulator Co.*, 262 NLRB 285, 303 (1982), the employer raffled off a 7-day trip to Hawaii for two with spending money. In both cases, the Board relied on the value of the prizes in concluding that the holding of the raffles interfered with free choice in the elections. The Board stated in *Drilco,* raffles will be found objectionable where "the size of the leading prize is so great as to divert the attention of the employees away from the election and its purpose . . . [and] inherently induce[] those eligible to vote in the election to support the Employer's position." 242 NLRB at 21.

Such an approach is logical in theory, but the Board has failed to apply it consistently. For instance, in *E. A. Nord Co.*, 276 NLRB 1418, fn. 2 (1985), the Board was persuaded that "the five $252 prizes offered by the Respondent in the election raffle were so substantial that the raffle constitutes objectionable conduct warranting setting aside the election." However, in *Sony*, the Board found that the raffle of a $1300 television set and a $280 Discman—prizes whose individual and aggregate value exceeded both the individual and aggregate value of the prizes in *E. A. Nord*—were not so substantial as to warrant a new election. *Sony*, 313 NLRB at 420–421. Similarly, when evaluating the effect on the electorate of a television set offered in a raffle, the Board has gone both ways. Compare: *Tunica Mfg. Co.*, 182 NLRB 729, 743 (1970) (raffle of color television set, valued at $350–$400, not objectionable); and *American Induction Heating*, 221 NLRB 180 (1975) (raffle of television not objectionable); with *National Gypsum Co.*, 280 NLRB 1003 (1986) (two raffles, conducted simultaneously at three different plant locations, held objectionable, in part, because the prizes offered—$270 television sets and $261 in cash—were of "substantial value").

In *Olympic Products, Inc*., 201 NLRB 442 (1973), the Board took a different approach altogether to an election day raffle, and based its decision on two factors not among the traditional array of considerations that had emerged in and after *Hollywood Plastics.* In *Olympic*, the plant manager personally released employees to vote instead of using the public address system, as had been agreed upon at the preelection conference. Additionally, the plant manager "utilized his own breach of procedures to solicit employees to participate in the raffle." The Board held that this "combination of circumstances" was "sufficiently disruptive" to warrant a new election.

Finally, in *APS*, supra, 325 NLRB 723, the Board's most recent analysis of the subject, the raffle was announced in a leaflet that urged employees to vote against the union. The flyer notified employees that, in the past, the employer had paid off duty employees for their time spent voting, but, because of a recent ruling by the National Labor Relations Board, that practice was no longer permitted. (The employer was apparently referring to *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), in which the Board held that it would no longer permit off-duty employees to be paid for voting.) "Instead," the flyer stated, the employer would provide raffle prizes for voters, including two color television sets and two video cameras. The value of the prizes totaled approximately $4000. The raffle was conducted on the day of the election, and the prizes were awarded approximately a week after the election.

A Board hearing officer recommended that the union's objection be sustained and a second election conducted. Two members of a three-member Board panel voted to reverse the hearing officer and overrule the union's objection, but they were unable to agree on a common rationale.

Member Hurtgen authored the lead opinion, and he reasoned that all the elements of the *Sony* test militated in favor of finding the raffle to be unobjectionable. With respect to the *Sony* factor of the substantiality of the prizes, however, Member Hurtgen focused not on the value of the prizes being raffled, but on the value of an individual raffle ticket. In addition, Member Hurtgen did not attempt to

reconcile the *Sony* test with the Board's subsequent decision in *Sunrise*, stating that he disagreed with *Sunrise*. Further, even accepting *Sunrise* as the law, Member Hurtgen concluded that it was distinguishable because it involved the payment of wages, and "raffles are treated differently from wages." 325 NLRB at 724.

In a concurring opinion, Chairman Gould stated that he disagreed "with the Board's current approach in this area, i.e., that an election day raffle is objectionable if the prizes are of a substantial value." 325 NLRB at 725. Thus, contrary to Member Hurtgen, Chairman Gould viewed Board precedent as focusing on the value of the raffle *prizes*, not on the value of the raffle *ticket*. In addition, unlike Member Hurtgen, Chairman Gould stated that "the analysis of election day raffles needs to be consistent with the Board's decision in *Sunrise*." Id. Chairman Gould believed such consistency could be achieved if the Board modified "its analysis of election day raffles to place primary consideration on whether the employer has, in the past, held raffles of a similar nature for employees." Id. In the absence of a majority vote for his position and because the record failed to show that the election day raffle was inconsistent with the employer's past practice, Chairman Gould voted to find that the raffle was not objectionable.

Member Liebman dissented, stating that she would set the election aside. She disagreed with Member Hurtgen's assertion that under Board law "raffles are treated differently" from other grants of benefits. She emphasized that the Board applied the same basic test in all grant of benefit cases, i.e., whether the challenged conduct "had a tendency to influence the outcome of the election." 325 NLRB at 726 fn. 2. Her opinion took into account not only *Sony,* but also other grant of benefit cases, including *Sunrise* (paying off-duty employees to vote). In concluding that the raffle interfered with the election, she relied on the manner in which the raffle was announced (flyer urging employees to vote "no") by the employer, and the substantial value of the prizes.

B. A New Approach to Election Day Raffles

This survey of precedent reveals that current Board law is at best confusing on the question whether the holding of a raffle in connection with an election destroys the laboratory conditions necessary for assuring employees full freedom of choice in selecting a bargaining representative. As outlined above, the Board's multifactor approach has sometimes led to contradictory results, leaving labor and management without clear guidance on the line separating objectionable from unobjectionable conduct. The Board's most recent election raffle decision of *APS* is likely to lead to further confusion and litigation. One of the main factors on which the Board focused for many years, i.e., the value of the raffle prizes, was seemingly abandoned by a majority of the Board panel in *APS* (Chairman Gould and Member Hurtgen), but they could not agree on a common rationale for doing so. A different majority in *APS* (Chairman Gould and Member Liebman) were of the view that Board law regarding election raffles, as summarized in *Sony*, should be consistent with more recent Board law barring payments to off-duty employees for voting, as set forth in *Sunrise,* but Chairman Gould and Member Liebman were unable to agree on how to harmonize the two decisions. As the Regional Director charitably phrased it, *APS* "cast[s] some doubt upon the continued applicability of the *Sony* test to election day raffles."

In sum, the time has come to reexamine and clarify this area of the law. We now turn to that task.

As discussed above, over the past 40 years, the Board has recognized that there are several ways in which an election raffle can interfere with the holding of a fair and free election. The potential harms include the following:

(1) Election raffles may provide a party with the means of determining how and whether employees voted.

(2) Election raffles may condition participation on how the employees voted or on the results of the election.

(3) Election raffles may offer prizes so substantial as to either (a) divert the attention of the employees away from the election and its purpose or (b) inherently induce employees to vote in favor of the party sponsoring the raffle.

Beginning with *Hollywood Plastics* in 1969 and culminating with *APS* in 1998, the Board has scrutinized election raffles on a case-by-case basis seeking to determine whether one of these prohibited elements is present. In essence, the Board has been engaged in an elaborate exercise in line drawing, attempting to separate objectionable election raffles from unobjectionable ones. After careful consideration, we have decided to cease drawing this line. As our review of the Board's decisions in this area amply demonstrates, the costs of the case-by-case approach have been unacceptably high: time-consuming litigation, divided Board decisions, confusing and seemingly inconsistent results, and unwarranted delays in the completion of representation proceedings. Contrary to our dissenting colleagues, we believe the need for change is clear. We have, therefore, decided to abandon the *Hollywood Plastics-Sony-APS* approach of reviewing election raffles on a case-by-case basis and to adopt instead a bright-line rule that lends itself to definite, predictable, and speedy results.

Furthermore, consistent with the views Chairman Gould and Member Liebman expressed in *APS*, we believe that Board law concerning election raffles must be harmonized with the Board's decision in *Sunrise*, supra, 320 NLRB 212. In *Sunrise*, the Board held that "monetary payments that are offered to employees as a reward for coming to a Board election and that exceed reimbursement for actual transportation expenses amount to a benefit that reasonably tends to influence the election outcome." Id. Specifically, the objectionable conduct in *Sunrise* consisted of an offer to provide employees who were not scheduled to work on the day of the election 2 hours of pay merely for arriving at the employer's facility. Because the employer also offered to provide transportation to the employer's

facility, it was clear that the monetary payments were not linked in any way to transportation expenses.

In determining whether the employer's offer of pay was objectionable, the Board applied the well-established test of whether the "challenged conduct has a reasonable tendency to influence the election outcome." Id. The Board reasoned that because the offer was not linked to transportation expenses, employees would reasonably perceive the payment as "something extra . . . on election day." 320 NLRB at 213. In addition, the Board observed that the offer of two hours' pay was announced in a leaflet that urged the employees to vote "No." In these circumstances, the Board concluded that "employees would reasonably perceive the 2 hours' pay as a favor from the Employer which the employees might feel obligated to repay by voting against the Union, as the Employer requested." Id.

Like the conduct in issue in *Sunrise*, an offer of an opportunity to win a prize by participating in an election raffle would reasonably be viewed by employees as "something extra . . . on election day." 320 NLRB at 213. In addition, raffles are typically announced in election propaganda exhorting the employees to vote in favor of the party sponsoring the raffle or, at the very least, linking the raffle to issues raised by that party, such as the amount of dues employees will be required to pay if they choose union representation. Therefore, employees would reasonably perceive the offer to win a raffle prize as a "reward" or "favor . . . which the employees might feel obligated to repay" at the polls. Id. Consequently, election raffles are objectionable under the rationale of *Sunrise*.[12]

We are not persuaded by the argument that election raffles merely encourage employees to vote. As the Board recently explained in *United Cerebral Palsy Assn. of Niagara County*, 327 NLRB 40 (1998), "maximum voter participation in Board-sponsored elections is a laudable goal. However, the Board must protect employee free choice in all voting decisions." Where the challenged conduct is objectionable, i.e., it has a reasonable tendency to influence the election outcome, the fact that the conduct may also encourage voter turnout is immaterial.

In conclusion, having reconsidered Board precedent in this area in light of *Sunrise*'s prohibition on offering employees rewards on election day, we have decided to adopt a new rule barring election raffles. Specifically, our rule prohibits employers and unions from conducting a raffle if (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls. The term "conducting a raffle" includes the following: (1) announcing a raffle; (2) distributing raffle tickets; (3) identifying the raffle winners; and (4) awarding the raffle prizes. If there is a showing that such a raffle has occurred during the proscribed period, we will set aside the election upon the filing of a valid objection.[13] We will also look with disfavor on attempts to circumvent this rule by, for example, announcing a raffle more than 24 hours before the opening of the polls and then completing the raffle immediately after the closing of the polls.

We hasten to add that our new rule does not encompass certain types of electioneering that we have historically found not to be objectionable. For instance, prior to a Board election, parties often distribute T-shirts, hats, buttons, stickers, or other items bearing a message or insignia, that have no "intrinsic value sufficient to necessitate our treating [them] differently than other types of campaign propaganda, which we do not find objectionable or coercive." *R. L. White Co.,* 262 NLRB 575, 576 (1982); accord: *NLRB v. Coca-Cola Bottling Co*., 132 F.3d 1001, 1005 (4th Cir. 1997) ("[T]he Board has carved out a niche for grants of benefit which, although of some economic value, are intended as mere propaganda and do not threaten to create a sense of obligation on the part of employees. The paradigm example of this is the distribution of . . . buttons and bumper stickers. . . . "). Similarly, our new raffle rule does not disturb our prior decisions regarding such campaign devices as providing free food, drink, or parties prior to the election, which we will continue to

[12] In reaching this conclusion, we note that the Federal and many State governments also prohibit, under their respective criminal codes, the use of financial incentives to induce citizens to vote, or to refrain from voting, in an official public election. See, e.g., 18 U.S.C. § 597 (making it a crime to "make[] or offer[] to make an expenditure to any person, either to vote or to withhold his vote, or to vote for or against any candidate . . ."); Alaska Stat. § 15.56.030 ("a person commits the crime of unlawful interference with voting if the person . . . knowingly pays, offers to pay, or causes to be paid money or other valuable thing to a person to vote or refrain from voting in an election; . . . 'other valuable thing' includes . . . an entry in a game of chance in which a prize of money or other present or future pecuniary gain or advantage may be awarded to a participant . . ."); Ariz. Rev. Stat. Ann. § 16–1014 ("it is unlawful for a person . . . to treat, give, pay, loan, contribute, offer or promise money or other valuable consideration . . . to or for a voter . . . to induce the voter to vote or refrain from voting . . . or to induce the voter to go to the polls or remain away from the polls . . ."); Colo. Rev. Stat. § 1–13–720 (same); Haw. Rev. Stat. § 19–3 (same); Ind. Code § 3–14–3–19 (same); Ky. Rev. Stat. Ann. § 119.205 (same); Mo. Rev. Stat. § 115.635 (same); Mont. Code Ann. § 13–35–214 (same); N.J. Stat. Ann. § 19:34–25 (same); N.Y. Elec. Law § 17–142 (McKinney) (same); S.D. Codified Laws Ann. § 12–26–15 (same); Tenn. Code Ann. § 2–19–126 (same); Utah Code Ann. § 20A–1–601 (same); W. Va. Code § 3–9–16 (same); Wis. Stat. Ann. § 12.11 (same).

[13] We overrule prior cases to the extent that they are inconsistent with the rule we announce today.

Raffles conducted more than 24 hours before the scheduled opening of the polls, not aimed at encouraging employees to come out to vote, do not raise the concerns that underlie the Board's decision in *Sunrise.* Rather, such raffles held earlier in the election campaign primarily would raise issues of whether or not they involve promises or grants of benefits that would improperly affect employee free choice; or whether they allow the employer to identify employees who might or might not be sympathetic, and thus to learn where to direct additional pressure or campaign efforts. See *National Gypsum Co.*, 280 NLRB 1003 (1986). Accordingly, we shall not apply our new per se rule to such raffles, but shall analyze them based on whether or not they implicate those particular concerns.

examine under the *B&D Plastics*, 302 NLRB 245 (1991), test to determine whether the grant of benefit would improperly tend to influence the outcome of the election.[14]

IV. APPLICATION OF THE RULE TO THIS CASE

Having adopted the new rule, we now apply it to the facts of this case.[15] Approximately 5 days before the election, the Employer announced that a TV/VCR would be awarded in a raffle to be conducted on the day of the election. An Employer representative distributed raffle tickets to employees as they approached the voting area on the day of the election. The distribution of raffle tickets within the 24 hours immediately preceding the election and throughout the duration of the polling itself is objectionable under our new rule. Accordingly, we shall set aside the results of the October 5, 1998 election, and order that a new election be held.

[Direction of Third Election omitted from publication.]

MEMBERS HURTGEN AND BRAME, dissenting.

The raffle in this case clearly passed muster under *Sony Corp. of America*, 313 NLRB 420 (1993). The Regional Director so found, and our colleagues do not disagree. Instead, and in recognition of this fact, our colleagues overrule *Sony* and over 31 years of Board law. We would not do so.

As shown by our colleagues, the law in this area has gone from a per se acceptance of raffles to a "multi-factor" approach. The latter approach began in 1969 in *Hollywood Plastics, Inc.*, 177 NLRB 678 (1969). Its most recent expression was in 1993 in *Sony Corp*. Our colleagues now abandon this 31-year-old approach and return to a per se approach (this time to prohibit raffles). There is no need for this dramatic change in law, and the change itself is not a good policy choice.

With respect to the need for change, our colleagues assert that the current multi-factor test is uncertain. They thus prefer a per se approach. However, in the great majority of areas with which the Board deals (both unfair labor practice cases and representation cases), the Board eschews a per se approach and follows a "relevant circumstances" approach.[1] Although this approach is less certain than a mechanistic one, that is the price that the Board chooses to pay in order to decide cases according to their facts.

The majority seeks to exaggerate the number of areas where a per se approach is followed. In truth, the only ones cited which actually fall within this narrow area are *Peerless Plywood*, 107 NLRB 427 (1953), and *Kalin Construction*, 321 NLRB 649 (the latter was a 1996 case that overruled 30 years of Board law).[2]

In short, the Board usually eschews a per se approach. With respect to raffles, it has done so for 31 years. The test of *Sony* continues that tradition. In *Sony*, the Board said:

> The Board has held that the conduct of a raffle does not constitute a per se basis for setting aside the election. Rather, the Board will consider all of the attendant circumstances in determining whether the raffle destroyed the laboratory conditions necessary for assuring employees full freedom of choice in selecting a bargaining representative. Some of the factors considered relevant by the Board have been whether the circumstances surrounding the raffle provided the employer with means of determining how and whether employees voted, whether participation was

[14] See, e.g., *Chicagoland Television News*, 328 NLRB 367 (1999) (12-hour party on the day before the election not objectionable, in part, because of the employer's history of holding such social events and because the cost of the event was not excessive); *Jacqueline Cochran, Inc.*, 177 NLRB 837 (1969) (union's distribution of Thanksgiving turkey and Christmas party during critical period not objectionable); *Chicago Tribune*, 326 NLRB 1057 (1998) ("lavish" $8000 brunch for 24 unit employees and their spouses, children, and guests, in which the employer provided gifts, valet parking, babysitting service, entertainment, opportunities to meet Santa Claus, and separate dining for children, held 3 days before decertification election, found objectionable); *Preston Products Co.*, 158 NLRB 322 (1966) (employer's party 2 days before election, which included hard and soft liquid refreshments, corsages, a band, and distribution of watches to employees, held coercive), enf. granted in pertinent part 392 F.2d 801 (D.C. Cir. 1967).

[15] In accordance with our usual practice, we shall apply our new rule not only "'to the case in which the issue arises,' but also 'to all pending cases in whatever stage.'" *Midland National Life Insurance Co.*, 263 NLRB 127, 133 fn. 24 (1982), quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958).

[1] The majority's imposition of a per se rule banning raffles conflicts with the Board's and the courts' customary approach of applying an *in the circumstances* analysis in both representation and unfair labor practice proceedings. Where a representation objection is filed asserting that the "laboratory conditions" [*General Shoe Corp.*, 77 NLRB 124, 127 (1948)], under which Board elections are to be held, have been violated by a *party* to an election, the decisional standard is whether 'the conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election." [*Baja's Place, Inc.*, 268 NLRB 868 (1984).] In an unfair labor practice proceeding, the question, regarding employer conduct, is whether it may reasonably tend "to interfere with, restrain, or coerce," [*NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)], or, regarding union conduct, whether it may reasonably tend to "restrain or coerce" [*Operating Engineers Local 542 v. NLRB*, 328 F.2d 850, 852–853 (3d Cir. 1964), cert. denied 379 U.S. 826 (1964)], employees exercising rights secured by Sec. 7 of the Act.

Utilizing an "all the circumstances" rather than a "per se" approach in raffle cases is firmly supported by analogy to Board and court cases involving alleged unlawful interrogation of employees. See *Rossmore House*, 269 NLRB 1176 (1984), affd. sub. nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). We stress that, as with interrogations, raffles are conducted in a multiplicity of circumstances. Like the multifactor test adopted by the Board in *Rossmore House*, supra at 1178 fn. 21, as an aid in assessing the lawfulness of interrogations, the *Sony* test is an appropriate vehicle for determining whether a particular raffle "reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Baja's Place, Inc.,* supra at 868.

[2] The other "rules" cited by our colleagues are hardly per se and mechanistic. In this regard, our colleagues cite the prohibition against the "bestowal of economic benefits" that have "a tendency to influence the outcome of an election," citing *Gulf States Canners*, 242 NLRB 1326 (1979), enfd. 634 F.2d 215 (5th Cir. 1981). These terms are not mechanistic, and indeed they have spawned much litigation. Similarly, the *Michem* principle relates to prolonged conversations at or near the polling place. *Michem, Inc.*, 170 NLRB 362 (1968). Again, these terms are not mechanistic and are often litigated.

> conditioned upon how the employees voted in the election or upon the result in the election, and whether the prizes were so substantial as to either divert attention of the employees away from the election and its purpose or as to inherently induce those eligible to vote in the election to support the employer's position.

313 NLRB 420, quoting *Grove Valve & Regulator Co.*, 262 NLRB 285, 303 (1982).

There is no reason to abandon 31 years of the "relevant circumstances" approach. The Board should apply that approach to raffles just as it does in other areas of Board law.

In addition, the new rule itself is unwise policy. The *Sony* test shows that none of the potential harms that the Board has traditionally found may stem from raffles are present here. We have set forth below the asserted harms, and we have shown that they are not present here.

> (1) Election day raffles may provide a party with the means of determining how and whether employees voted, but the Employer here took care to assure that it would not be able to tell how or whether employees voted. Participation in this election was not a condition of participation in the Employer's raffle.
>
> (2) Election day raffles may condition participation on how the employees voted or on the results of the election, but participation in this raffle was not conditioned on how employees voted or on the results of the election.
>
> (3) Election day raffles may offer prizes so substantial as to either (a) divert the attention of the employees away from the election and its purpose,[3] or (b) inherently induce employees to vote in favor of the party sponsoring the raffle, but the prize offered here was not so substantial as to divert the attention of the employees away from the election or to vote in favor of the Employer. A raffle ticket is a *chance* at a prize. Realistically, the value of the ticket is the amount of the prize divided by the number of eligible participants. Thus, the benefit here is under $3 per employee.[4]

The announced purpose of the raffle was to induce employees *to vote*, irrespective of how they might vote. Surely, in the industrial democracy that we seek to foster, this is a laudable goal.[5]

Further, the majority's new rule makes no sense, even under its own terms. Under that rule, if a party holds a raffle within 24 hours before the opening of the polls, the raffle is condemned per se, even if it is not tied to voting or being at the election site. Thus, during this period, a raffle for a small prize is condemned per se, even if it is not tied to the election, while a large dinner is *not* condemned per se, even if it *is* tied to the election.[6]

Finally, the phrase "tied to" is ambiguous and will itself spawn litigation.

For all of the foregoing reasons, the Board should not change Board law, should not embrace a per se approach, and, in any event, should not adopt the rule enunciated here.[7]

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[3] Our colleagues find that raffles, such as the Employer conducted here, are likely to divert the attention of voters away from the purpose of their voting in the election. Yet, the Board has found unobjectionable conduct that went beyond possibly diverting voters' attention from the focus of the election to the point of actually trying to influence their free choice in the balloting. For example, the Board certified unions in *Comcast Cablevision of New Haven*, 325 NLRB 833 fn. 3 (1998) (union demonstrated on the morning of the election stopping vehicles entering and exiting the employer's facility and loudly urging employees riding in them to vote for the union), *O'Brien Memorial*, 310 NLRB 943, 944 (1993) (union officials and prounion employees yelled and chanted "Vote Yes" throughout the balloting), and *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), enfd. 703 F.2d 876 (1983), rehearing denied enfd. mem. 708 F.2d 720 (5th Cir. 1983) (union officials distributed campaign literature and spoke to employees just before they entered a glass-paneled door that ultimately led to the polling place), despite the campaign activities of union officials during the polling hours. The majority's expressed rationale here is inconsistent with these cases.

[4] Although we agree with the dissent in *Sunrise Rehabilitation*, 320 NLRB 212 (1995), it is clearly distinguishable. It involved a *wage benefit* for *all* off-duty employees who came in to vote. That is, the benefit was an employment benefit and it was certain. Thus, the Board applied the test of *B&D Plastics*, 302 NLRB 245 (1991), rather than the "raffle" test of *Sony*.

[5] Furthermore, as a practical matter, only employers have chosen to use election raffles as a campaign device in order to induce employees to vote. Thus, the majority's decision to effectively ban election raffles has an adverse impact on just one party to our elections—employers. Our colleagues have selectively chosen to single out a legitimate campaign tactic used by employers to increase voter turnout and arbitrarily prohibited it.

[6] The Board in *Chicagoland Television News,* 328 NLRB 367 (1999), suppd. by 330 NLRB 630 (2000), held, inter alia, that an employer did not engage in objectionable conduct by holding a 12-hour party for employees the day before the election at which it provided free food and drink. Cf. *Chicago Tribune*, 326 NLRB 1057 (1998) (employer engaged in objectionable conduct by providing a brunch for 24 eligible voters and their families that cost nearly $8000 and holding it 3 days before a decertification election).

[7] Member Brame further notes that the majority seeks support for their decision in state and Federal statutes prohibiting parties' use of financial incentives in public elections. This purported analogy is both interesting and inapposite. It is interesting in that, during the period from 1986 to 1996, the turnout in Board-conducted elections ranged from 87 to 89 percent (Board's Annual Report: Vols 51–61 (1986–1996), while the turnout in the three presidential elections occurring within this period was 50 percent in 1988 (the Internet: http://www.fec.gov/ pages/rat88.htm), 55 percent in 1992 (the Internet: http://www.fec.gov/pages/rat92.htm) [the highest since 1972 (*1995 Information Please Almanac Atlas & Yearbook*, Houghton Mifflin Company (1995))], and 49 percent in 1996 (the Internet: http://www.fec.gov/pages/96to.htm), with the trend generally heading downward. The analogy is inapposite in that the key components to public elections are the promises the candidates and their parties make regarding post-election conduct. By contrast, in Board elections one party—the same party whose get-out-the-vote tactic is being arbitrarily condemned today—is uniformly prohibited from making any promises. See *DTR Industries*, 311 NLRB 833, 835–837 (1993), enf. denied on other grounds 39 F.3d 106 (6th Cir. 1994), order supplemented 317 NLRB 825 (1995).